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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 101

CHAS. PFIZER & CO., INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and Regulations involved	4
Statement of the case	4
Reasons for granting the writ	10
Conclusion	18
Appendix (Bound under separate cover)	
Opinion of Commission	A1
First Opinion of Court of Appeals, 363 F.2d 757	A145
Opinion of Commission on Remand	A283
Second Opinion of Court of Appeals, 401 F.2d 574	A342
Judgment of Court of Appeals	A374
Order of Court of Appeals Denying Petitions for Rehearing	A375

PAGE

AUTHORITIES

Cases:

Arrow-Hart & Hegeman Elec. Co. v. *FTC*, 291 U.S. 587 (1934) ---- 17

Chicago, B. & O. Ry. Co. v. *Babcock*, 204 U.S. 585 (1907) ---- 11

Commonwealth Corp. v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968) ---- 15

Duke of Buccleuch v. *Metropolitan Board of Works*, L.R. 5 H.L. 418 (1872) ---- 11

Fayerweather v. *Ritch*, 195 U.S. 276 (1904) ---- 11

FTC v. *Eastman Kodak Co.*, 274 U.S. 619 (1927) ---- 17

FTC v. *Western Meat Co.*, 272 U.S. 554 (1926) ---- 17

Helene Curtis Indus., Inc. v. *Sales Affiliates, Inc.*, 121 F. Supp. 490 (S.D.N.Y. 1954), *aff'd*, 233 F. 2d 148 (2nd Cir. 1956) ---- 15

Morgan v. *United States*, 304 U.S. 1 (1938) ---- 11

Offutt v. *United States*, 348 U.S. 11 (1954) ---- 17

Orrison v. *Hoffberger Co.*, 97 F. Supp. 689 (D. Md.), *aff'd*, 190 F. 2d 787 (4th Cir. 1951) ---- 15

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) ---- 17

Service v. *Dulles*, 354 U.S. 363 (1957) ---- 12

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) ---- 16

United States v. *Morgan*, 313 U.S. 409 (1941) ---- 11

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) ---- 14

Vitarelli v. *Seaton*, 359 U.S. 535 (1959) ---- 12

Walker Process v. *FMC*, 382 U.S. 172 (1965) ---- 15

PAGE

Statutes:

5 U. S. C. § 1006(c) ---------- 4, 12

15 U. S. C. § 45(b) ---------- 3, 4, 5, 17

Miscellaneous:

Patent Office Rule of Practice 133(b) ---------- 9

Senate Judiciary Committee Report, S. Rep. No. 752, 79th Cong. 1st Sess. (1945) ---------- 12

Federal Trade Commission Rules of Practice, § 3.14 Evidence, § 3.21 Initial Decision ---------- 4, 12

Note, *Improperly Procured Patents: FTC Jurisdiction and Remedial Power*, 77 Harv. L. Rev. 1505 (1964) ---------- 17

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No.

CHAS. PFIZER & CO., INC.,

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v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHAS. PFIZER & CO., INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on September 30, 1968.

Opinions Below

The first opinion of the Federal Trade Commission (Appendix pp. 1-144)[1] is reported at [1963-1965 Transfer

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[1] The appendices to the present petition are bound under a separate cover bearing sequentially numbered pages from A1 to A375 as a matter of convenience.

Binder] CCH FTC Complaints and Orders ¶16,527. The first opinion of the court below (Appendix pp. 145-282), setting aside the Commission's order, is reported at 363 F.2d 757. The second opinion of the Federal Trade Commission (Appendix pp. 283-341) is reported at 3 CCH Trade Reg. Rep. ¶18,077. The second opinion of the court below (Appendix pp. 342-73) is reported at 401 F.2d 574.

Jurisdiction

The judgment of the court below (Appendix p. 374) was entered on September 30, 1968. A timely petition for rehearing was denied on November 8, 1968 (Appendix p. 375). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

A subcommittee of the Senate Judiciary Committee undertook an investigation of petitioner's trade practices, investigating *inter alia* allegations that one of petitioner's patents had been procured by fraud (Appendix pp. 157-60). Thereafter, in the regular course of Federal Trade Commission proceedings, a hearing examiner found that those allegations were not substantiated. His findings were set aside by the Commission, which found *inter alia* that the patent had been fraudulently obtained. On review, the Court of Appeals held that the Commission's proceedings were fatally defective because its Chairman, who had participated in the decision, had earlier served as Chief Counsel and Staff Director to the Senate Subcommittee on the identical issues; and the Court of Appeals held further that the Commission's findings of fraud were defective because not supported by substantial evidence.

On remand, the sole additional witness called by the Commission was the patent examiner who had granted

petitioner the patent. This witness was permitted to speculate about his mental processes, even though on cross-examination he admitted that he remembered absolutely nothing about what had transpired eleven years earlier when the patent application was before him. The Commission's new hearing examiner (the first one having left the Commission's employ) made findings of fraud, copying complaint counsel's request for findings verbatim even to the extent of including typographical errors. The Commission adopted the new hearing examiner's findings, and its action was sustained by the court below.

The following questions are now presented:

1. Whether it was proper to permit inquiry into the patent examiner's mental processes, particularly where his testimony contradicted contemporaneous documents in the Patent Office record, and where the opinion of the court below shows on its face that it relied only on the examiner's direct testimony and ignored entirely his admissions on cross-examination that he was without any present recollection of what had transpired eleven years earlier.

2. Whether the infected state of the present record, resulting (a) from the participation of the disqualified Commissioner who had served as prosecutor for the Senate Subcommittee, (b) from the verbatim copying of complaint counsel's request for findings, and (c) from the reliance on the patent examiner's testimony of his reconstructed mental processes, will support the order of the Federal Trade Commission.

3. Whether, even apart from all of the foregoing, the Federal Trade Commission has statutory power to decree affirmative relief that goes beyond the order to "cease and desist" that is authorized by Section 5(b) of the Federal Trade Commission Act (15 U.S.C. § 45(b)).

Statutes and Regulations Involved

1. Section 5(b) (15 U.S.C. § 45(b)) of the Federal Trade Commission Act provides in pertinent part:

> "If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited . . . it shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

2. Section 7(c) (5 U.S.C. § 1006(c)) of the Administrative Procedure Act provides in pertinent part:

> " . . . every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

3. FTC Rules of Practice

> "§ 3.14 Evidence
>
> b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded . . . "
>
> "§ 3.21 Initial Decision
>
> b) *Content.* Initial decisions shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence."

Statement of the Case

This proceeding was commenced on July 28, 1958, against petitioner and five other drug companies. It deals with tetracycline, an antibiotic on which a patent was issued to petitioner January 11, 1955. The other drug company

defendants were licensed by petitioner under this patent. From the time petitioner and its licensees first made tetracycline available to the public it has been the most important of all the broad spectrum antibiotics, with annual sales far in excess of any other antibiotic. It has saved innumerable lives and alleviated untold suffering (115a, 498a, 2001a-02a, 2433a-34a, 3320a-21a).[2]

The Complaint charged that petitioner had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 in the following respects:

> (a) By making misrepresentations to the Patent Office during the prosecution of its application for the tetracycline patent;
>
> (b) By conspiring with two other defendants to obtain a patent on tetracycline by fraud;
>
> (c) By conspiring with all the defendants to fix the prices of tetracycline; and
>
> (d) By conspiring with all the defendants to exclude competitors from the broad spectrum antibiotic market.

The hearing examiner, after extensive hearings lasting over a year, completely exonerated petitioner and the other defendants of all the unfair acts with which they were charged in the Complaint (99a-368a). On appeal, the Commission vacated the hearing examiner's initial decision and all of his numerous findings of fact. It held that petitioner had misrepresented or withheld material facts from the patent examiner during prosecution of its tetracycline patent application, and it held that petitioner and its licensees had conspired to fix the prices of tetracycline antibiotics. An order was entered requiring petitioner *inter*

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[2] Record reference to a page number followed by "a" refers to proceedings before the remand ordered by the United States Court of Appeals for the Sixth Circuit. Record reference to a page number followed by "S" refers to proceedings on remand.

alia to license its tetracycline patent to interested parties at a royalty not exceeding 2½% of the selling price for tetracycline (731a-37a).[3]

On review the court below vacated the Commission's order (Appendix p. 187) and remanded the case for a *de novo* consideration of all the issues without the participation of the Commission Chairman holding *inter alia:*

(a) Chairman Dixon should have disqualified himself because his participation in the hearing "amounted to a denial of due process which invalidated the Order under review," (Appendix pp. 153-63) since he had previously served as Chief Counsel and Staff Director of a Senate Subcommittee which investigated many of the major issues involved in the proceeding.

(b) The record failed to support the Commission's finding that the tetracycline patent was issued as a result of improper conduct by petitioner and another defendant (American Cyanamid Co.). This holding was summed up by the court as follows (Appendix p. 186):

> "We find the decision of the Commission on this issue to be based on inferences and speculation which are insufficient to constitute substantial evidence."

(c) The court below also noted that the patent examiner (Lidoff) who allowed the tetracycline patent, might be called as a witness on remand as well as other witnesses who had previously testified. The "ultimate questions" on the patent phase of the case were stated by the court below as follows (Appendix p. 184):

> "Did Lidoff receive all the information that he requested from Pfizer? And was Lidoff misled and deceived by Pfizer and Cyanamid and did he grant the tetracycline patent as the result of such deception?"

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[3] The Commission, in addition to its main opinion set forth in the appendix, also filed an "Opinion Accompanying Final Order" which is in the record at 738a-54a.

After the case was remanded, patent examiner Lidoff was called by complaint counsel to testify before a different hearing examiner. He was questioned about several interviews he had with petitioner's representatives over 11 years earlier concerning the patentability of tetracycline.

Lidoff admitted that he had no recollection of what occurred at these interviews, but the hearing examiner nevertheless permitted him to reconstruct what he thought his state of mind might have been at the time of the interviews. This conjectural evidence as to Lidoff's mental processes was admitted subject to petitioner's continuing objection (217S-18S).

The hearing examiner rendered a supplemental initial decision, incorporating verbatim most of the key findings proposed by complaint counsel including typographical errors. He held that petitioner and Cyanamid had made misrepresentations to and withheld material information from patent examiner Lidoff.

On the second appeal, the Commission (without its Chairman) rendered a decision (Appendix pp. 283-341) holding that petitioner and Cyanamid had violated Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) in that they made misrepresentations to and withheld information from the Patent Office during the prosecution of petitioner's application for a patent on tetracycline.[4] And it again ordered petitioner to license its tetracycline patent to interested parties at a royalty not exceeding 2½%. The Commission dismissed the remaining charges against petitioner and the other defendants.

When the court below reviewed the proceeding for the second time, it affirmed the Order of the Commission and

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[4] Two Commissioners who took part in the original hearing had left the employ of the Federal Trade Commission so the panel at the time of the remand hearing consisted of two of the original Commissioners and two new ones.

held that petitioner had procured its patent by fraud and must grant compulsory licenses thereunder.

The charge of fraud in the procurement of the tetracycline patent depended upon the answer to the question whether Lidoff received all the information he had requested (Appendix p. 184) during the course of interviews with petitioner's representatives eleven years previously. These interviews followed a rejection of certain claims of the tetracycline patent application because Lidoff had speculated that the methods of the prior Duggar and Niedercorn patents (relating solely to the production of a different antibiotic—Aureomycin) might accidentally have coproduced sufficient tetracycline—along with the desired Aureomycin—to make it unpatentable (5050a-51a). The record is undisputed that whatever tetracycline had occurred with Aureomycin was accidentally produced, its presence had never been recognized before petitioner's invention, and it had never been of any value to mankind.

The issue which pervades all of the key holdings of the Commission and the court below is: Did Lidoff request information from petitioner's representatives as to whether *any* amount of tetracycline however small and useless was produced in the prior Duggar and Niedercorn fermentation broths or was his inquiry directed to the production of *appreciable, recoverable, useful* amounts of tetracycline?

Lidoff admitted that he had no recollection of what was said during the interviews (*infra.* pp. 13-14) but he attempted to reconstruct his prior state of mind, and was permitted to testify on the basis of such reconstructed mental process that he would have been interested in the coproduction of any tetracycline in the prior art no matter how small and useless the amount, and he would not have granted the patent if he had been aware that *any* tetracycline was coproduced (215S, 216S, 253S, 285S). Both the Commission and the Court of Appeals bottomed their decisions squarely upon Lidoff's reconstructed state of mind testimony de-

spite the fact that it is contrary to the contemporaneous Patent Office record (see record citations below) and decisions of this and other courts holding that the unrecognized existence of useless trace amounts of a substance as an impurity in a prior art product does not defeat the patentability of claims directed to that substance.

It is petitioner's position that if Lidoff had remembered *what was said* at these interviews his testimony would have been of value but once he admitted he remembered nothing that was said he ceased to have any standing as a witness, since it was clearly improper and grossly unfair to allow him to guess as to what his mental processes were.

The summaries of the interviews between Lidoff and petitioner's representatives, which Lidoff did not challenge although he was under a duty to do so if they misstated his view (1727a-31a, 1961a-62a, 4317a-18a) are a part of the official Patent Office record (Rules of Practice 133(b)). They quote him as expressing interest only in recoverable, useful, appreciable amounts of tetracycline and as expressly disclaiming interest in "useless trace amounts." Far from representing that no tetracycline was coproduced with the prior art Aureomycin, these summaries and the affidavits submitted therewith requested Lidoff to assume the presence of as much as 10% tetracycline in the antibiotic content of the Aureomycin product obtained (5055a-56a, 5058a, 5067a-68a, 5077a-79a). If Lidoff in fact had expressed interest in small amounts of coproduced tetracycline back in 1954 he would have denied the patent at this point without further ado. His failure to do so then, speaks louder than his present surmise and guesswork.

The complete unreliability of Lidoff's "testimony" is further illustrated by his admission that his original rejection of the tetracycline claims was "questionable" "shaky on the law" and that "he did not recall ever having seen such a rejection before . . ." (288S, 357S).

Reasons for Granting the Writ

Whether the present record is broadly or narrowly viewed, it reflects an administrative proceeding so infected by error and unfairness that it should not be permitted to stand.

First. Viewing the matter narrowly, it is plain that the remand testimony of patent examiner Lidoff was the single factor which moved the court below from its original conclusion (Appendix p. 186), that the Commission's finding of improper conduct in obtaining the tetracycline patent was "based upon inferences and speculation which are insufficient to constitute substantial evidence * * * on the record considered as a whole," to its later holding (p. 346) that "The testimony of Lidoff together with the Patent Office records, substantially support the affirmative findings of the Commission." For the Patent Office file was already in evidence, no new document was introduced on behalf of complaint counsel at the second hearing, and, very significantly, the Patent Office records were inconsistent with Lidoff's reconstructed "state of mind" testimony (5055a-56a, 5058a, 5067a-68a, 5077a-79a).

Quite apart from inconsistencies, the critical point is that the Lidoff testimony consisted of inquiry into the witness' mental processes, as indeed the excerpts appended to the Court of Appeal's second opinion plainly show (Appendix pp. 367-73).[5] More than that, many of the patent

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[5] For instance, Lidoff was asked 1) ". . . to what extent were you aware . . " (Appendix p. 367), 2) ". . . were you concerned only with . . ." (Appendix p. 367), 3) ". . . if you had known . . ." (Appendix p. 367), 4) "Did you consider . . ." (Appendix p. 368), 5) ". . . were you interested in . . ." (Appendix 369), 6) "Did you draw a distinction . . ." (Appendix p. 370), 7) "Would your decision . . . have been different if . . ." (Appendix p. 371), 8) ". . . were you already aware of . . ." (Appendix p. 371), 9) ". . . if Cyanamid had revealed . . . would your decision . . . have been different?" (Appendix p. 372).

(continued)

examiner's answers were purely speculative and conjectural. (See pp. 13-14, *infra.*)

But, even if Lidoff had been able to reconstruct his mental processes accurately after eleven years, inquiry concerning them was plainly improper. The mental processes of an individual or of a body to whom is committed the power and the responsibility of deciding between conflicting contentions are, under a long line of unquestioned authorities, barred from subsequent inquiry; and this is equally true whether the earlier determination was made by a judge (*Fayerweather* v. *Ritch*, 195 U.S. 276 (1904)), or by an aribtrator (*Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 H.L. 418 (1872)) or by an administrative agency (*Chicago, B & O. Ry Co.* v. *Babcock*, 204 U.S. 585 (1907)). This rule in the last-named situation was reaffirmed not once but twice in the *Morgan* litigation of a generation ago. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938) ("it was not the function of the court to probe the mental processes of the Secretary"); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) ("the short of the business is that the Secretary should never have been subjected to this examination").

Many of the questions put to the patent examiner on the remand had been suggested as subjects of inquiry in the first opinion of the court below (Appendix pp. 182-84). These were plainly improper questions under the authorities cited just above, and petitioner maintained its objections thereto at all stages, before the hearing examiner, before

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(Footnote 5 continued)

And Lidoff's answers included the following: 1) "I was not aware of such information . . ." (Appendix p. 367), 2) ". . . I was interested in . . ." (Appendix p. 367), 3) ". . . had I known . . ." (Appendix p. 368), 4) ". . . I would not have been interested in . . ." (Appendix p. 369), 5) ". . . my interest would have been . . ." (Appendix p. 370), 6) ". . . my interest . . ." (Appendix p. 370), 7) ". . . the important factor in my view . . ." (Appendix p. 370), 8) ". . . I did not make a distinction in my mind . . ." (Appendix p. 370), 9) "In my opinion . . ." (Appendix p. 371), 10) "I was not aware of that fact." (Appendix p. 371).

the Commission, and in the court below (217S-18S) (Appendix pp. 306, 359).

The error in directing such inquiry, in permitting it, and finally in relying on it was further compounded when Lidoff was allowed to speculate as to what his forgotten mental processes eleven years earlier might have been. For it is hornbook law—indeed, every trial lawyer knows—that speculative or conjectural evidence is inadmissible, and the Administrative Procedure Act was adopted in part to do away with the practice in some agencies of basing their decisions upon "suspicion" and "surmise". Senate Judiciary Committee Report, S. Rep. No. 752, 79th Cong., 1st Sess. 30, 31 (1945). And this rule of evidence is not only plainly adopted by Section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006c), which requires all agency orders to be "supported by and in accordance with the reliable, probative, and substantial evidence," it is also included in the Federal Trade Commission's own Rules of Practice:

> "§ 3.14 Evidence
>
> "'(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. . . '"
>
> "§ 3.21 Initial Decision
>
> "'(b) *Content* . . . Initial decisions shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence.'"

Since, obviously, speculative evidence is unreliable, we have here another situation where an agency has disregarded its own regulations to arrive at a result. *E.g., Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957)

Not only did the court below rely on Lidoff's testimony as to his reconstructed mental processes, its opinion plainly

shows that it rested on the portions of such testimony that were adduced on direct examination; see the appendix to the opinion below (Appendix pp. 367-73). Nowhere in the opinion below is there the slightest recognition that, on cross-examination, Lidoff admitted to a complete loss of recollection:

1. "So that anything that I say as having recalled something is really a reconstruction in my mind based on what recent review of the record I have had, which has not been in any great detail. So that I cannot say that I positively recall one thing or another. But I can reconstruct what my view would have beeen at that time." (220S)

2. "That's correct. And it is based—my reconstruction is necessarily based on—not on what I remember, but on what I know, my feelings and views of what patent practices were at that time." (249S)

3. "As I pointed out before, it is utterly impossible for me to remember any statements that I actually made at the interview." (260S)

4. Q. "But as of this date, isn't it true that you just don't recall what you did read?" A. "Of course, that is true."

   Q. "And isn't it true that you don't recall just what information from this massive record you had in your mind?" A. "This is so."

   Q. "And isn't it true that when you say I knew nothing about co-production, that is based on your present day construction of what you thought might have been a frame of mind 11 years ago?" A. "Exactly. As I have prefaced all my remarks, everything I have said is based on reconstruction based upon what I think—what I thought the principles of patentability were. I agree with you perfectly." (281S)

5. "Again, I can't remember what was said, . . ." (282S)

6. A. "I have no notion of what I said to them."
Q. "You can't even remember a single statement that you said?" A. "Not one single word." (299S-300S)

7. ". . ., it is impossible for me to remember specifically any fact there . . ." (359S)

In thus systematically ignoring all of Lidoff's admissions of departed recollection, the court below has not only in effect deprived petitioner of the benefit of cross-examining the witness, it has failed to follow the ruling of this Court that review of agency action since the Administrative Procedure Act must be based on the whole record. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). All too plainly, studied oversight of a witness' admissions on cross-examination of his complete lack of recollection cannot under any formula qualify as review of the whole record.

In addition to the gravely prejudicial error of basing a decision on Lidoff's speculated mental process testimony, the court below went even further and set an impossible "standard of candor and trust" for applicants and their attorneys before the Patent Office. The court held even though petitioner understood Lidoff was interested only in recoverable amounts of tetracycline, it should have made a "full disclosure" concerning the coproduction of useless trace amounts, about which Lidoff might have had some unmentioned interest. This is so, according to the court, even though the additional information had absolutely no bearing on the validity of the patent (Appendix pp. 361-62).

Until the decision of the court below, fraud on the Patent Office could only be established by clear, convincing and unequivocal proof that there were misrepresentations and they were intentionally made and were material. "Good

faith" was a complete defense. *Walker Process* v. *FMC*, 382 U.S. 172, 177 (1965); *Orrison* v. *Hoffberger Co.*, 97 F.Supp. 689, 691 (D. Md.), *aff'd*, 190 F.2d 787 (4th Cir. 1951); *Helene Curtis Indus., Inc.* v. *Sales Affiliates, Inc.*, 121 F.Supp. 490, 510-12 (S.D.N.Y. 1954), *aff'd*, 233 F.2d 148 (2nd Cir. 1956).

But under the standard set by the court below, a "good faith" disclosure is not enough and an attorney can be impaled upon a charge of fraud if he fails to discuss information bearing on an uncommunicated interest of the patent examiner having no effect on the validity of the patent.

Second. Viewing the present case in its broader aspects presents an even more disturbing situation.

We have, first, a proceeding vitiated by the indisputable fact that the prosecutor who investigated the circumstances under which the present patent was granted and, in particular, the issue whether petitioner dealt less than fairly with the Patent Office in advancing its application, was, when these identical questions came before the Federal Trade Commission, Chairman of that agency, and that as such he refused to disqualify himself from considering them in another capacity. The Court of Appeals very properly held him disqualified (Appendix pp. 153-63 and 188-270). For, as this Court thereafter said just a few months ago (*Commonwealth Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968)):

> "any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias."

It is of course entirely unrealistic to suppose that the Chairman's participation in the Commission's first decision did not contribute to that body's rejection of its initial hearing examiner's findings, which, on a record extending to 11,000 pages of testimony subjected to cross-examination, plus 8,000 additional pages of documents, were favorable to petitioner on the very issues that had been before the

Senate Subcommittee *ex parte* before it was submitted to the Commission.

Nor is it realistic to suppose that the influence of the Commission's first findings evaporated once its Chairman had been disqualified. The first hearing examiner, whose findings based on his observation of the witnesses had been rejected by the Commission, had by then left its employ. The new hearing examiner, all too plainly, was not disposed to reexamine the conflict between his predecessor's findings and the Commission's findings that had followed participation by the later disqualified prosecutor-turned-Chairman. Instead, the new hearing examiner not only copied complaint counsel's requested findings verbatim as his own, a course which this Court has strongly condemned (*United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651, 656-57 (1964)), he copied as well the typographical errors contained in complaint counsel's requests.[6]

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[6] The blatant copying by the hearing examiner is illustrated by pages 80S-102S of his initial decision on remand, which is identical with the proposed findings in complaint counsel's brief at 10S-21S, 25S-34S, and 42S-48S.

The hearing examiner followed the same practice and permitted complaint counsel to write the heart of his decision with respect to the findings of fact and explanations applicable to Cyanamid. Compare pages 103S to 107S with pages 49S to 55S.

That the examiner did not even consider the record is indicated by the fact that some of his quotations from documentary evidence contain the same typographical errors as appeared in complaint counsel's proposed findings. For example, in a quotation from one of the patent applications involved in the litigation the word "promotion" appears instead of "production" and the same error appears in complaint counsel's proposed findings. (Compare 103S with 49S). In another instance, the record shows Cyanamid's patent attorney frequently misspelled "Niedercorn" as "Neidercorn" (5436a, 5781a, 5782a, 5783a) but both the examiner and complaint counsel correctly (but improperly) spelled "Niedercorn" when they quoted the same statements by Cyanamid's patent attorney. (Compare 104S and 105S with 51S and 52S)

If it is important that "justice must satisfy the appearance of justice" (*Offutt* v. *United States*, 348 U.S. 11, 14 (1954)) then, assuredly, the present proceeding does not satisfy the test. The influence of the Senate Subcommittee's Chief Counsel carried over into the administrative proceeding, from which as a practical matter, it could not be and has not been eradicated, any more than an egg can be unscrambled or a bell un-rung.

Not only that, but the decisive element that was said to turn insubstantial into substantial evidence was inadmissible testimony into a quasi-judicial officer's mental processes, testimony that was rendered even more incompetent because it was speculative and did not rest on memory.

Third. Finally to cap this structure of unfairness cemented by error, the Commission, whose power under Section 5(b) of the FTC Act and under the decisions of this Court is limited to issuing cease and desist orders (15 U.S.C. § 45(b); *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623 (1927); *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587 (1934); *FTC* v. *Western Meat Co.*, 272 U.S. 554, 560-63 (1926)), has here undertaken to decree affirmatively that petitioner must license its tetracycline patent at a royalty rate specified in the Commission's order (Appendix pp. 334, 335). Only where an administrative agency has been given exclusive jurisdiction over an entire industry (*Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)) has this Court approved the assumption of power in the agency to grant affirmative relief—absent specific authorization in the enabling act to grant such relief i.e. FTC cases arising under § 7 of the Clayton Act. The importance of this question is emphasized by the author of Note, *Improperly Procured Patents: FTC Jurisdiction and Remedial Power*, 77 Harv. L. Rev. 1505, 1516-17 (1964).

Even apart from all of the other infirmities in this record, such a crass disregard of statutory limitations imperatively calls for review.

Conclusion

For each of the above reasons, together with the widespread public interest in this case which has existed for more than a decade, we respectfully suggest that this Petition should be granted.

Respectfully submitted,

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